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No. 96-942

In the Supreme Court of the United States

OCTOBER TERM, 1996

FIRST SECURITY BANK, ET AL., PETITIONERS

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL DEPOSIT INSURANCE CORPORATION IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly affirmed the district court's denial of petitioners' request to intervene, when petitioners failed to comply with the district court's directive that they state with specificity their asserted interest in the litigation.

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OPINIONS BELOW

The per curiam opinion of the court of appeals (Pet. App. A17-A25) is unpublished, but the judgment is noted at 91 F.3d 130 (Table). The orders of the district court (Pet. App. A8-A9, A10-A11, A12-A14) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 22, 1996. A petition for rehearing was denied on September 25, 1996. The petition for a writ of certio-

rari was filed on December 13, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On April 18, 1991, First Security Bank (First Security), together with several of its shareholders and directors, filed suit against First Virginia Bank, Inc., its wholly owned subsidiary First Virginia Bank-Southwest (First Virginia), and certain of their officers and directors. The plaintiffs retained Joseph L. Anthony as counsel to pursue the case on a contingency-fee basis. The gravamen of the complaint was that the defendants engaged in a scheme to cover up bad loans that had been extended by Thomas E. Hartman during his tenure as a vice president of First Virginia, and that, when Hartman left First Virginia to serve as an officer of First Security, the defendants concealed from First Security the fact that Hartman had extended the bad loans. The plaintiffs alleged that the defendants' failure to disclose Hartman's lending indiscretions enabled Hartman to make fraudulent loans on behalf of First Security. Gov't C.A. Br. 4-5; Pet. 7.

2. On May 24, 1991, First Security was declared insolvent and the Federal Deposit Insurance Corporation (FDIC) was appointed as its receiver. Gov't C.A. Br. 5. As receiver, the FDIC succeeded to all of First Security's rights, titles, and interests, including its pending claims against the First Virginia defendants. See 12 U.S.C. 1821(d)(2)(A).

On May 30, 1991, the FDIC notified Anthony that all of First Security's putative creditors were required to file their claims with the FDIC by August 28, 1991. On August 15, 1991, the FDIC formally terminated Anthony's representation of First Security

and advised Anthony to submit any claims that he might have against First Security. Anthony's law firm submitted one such claim, on which the FDIC ultimately issued payment (in the form of a receiver's certificate) in the amount of $3,535.50. Gov't C.A. Br. 5-6.

Anthony, however, refused to acknowledge that he had been terminated as First Security's counsel, and refused to join in a consent order substituting the FDIC as plaintiff. Accordingly, the FDIC was forced to move to compel Anthony to relinquish all litigation files in his possession related to the case and to substitute itself as sole plaintiff. Gov't C.A. Br. 6.

Although none of the counts in the complaint set forth a claim of direct injury to any of First Security's shareholders or directors, the FDIC later scaled back its substitution motion to request that it be substituted as plaintiff only with respect to those claims asserted directly by First Security. Gov't C.A. Br. 6. The parties and the district court referred to First Security's claims as "derivative claims," and to whatever separate and independent claims the named individuals might have had as "nonderivative claims." *Id.* at 6 n.3. Those short-hand designations were inaccurate, however, because the complaint did not actually purport to state any derivative claims, and it contained no allegations that met the requirements for a derivative claim under Rule 23.1 of the Federal Rules of Civil Procedure. See C.A. App. 11-73. Rather, all of the claims asserted concerned injuries suffered directly by First Security.

On September 29, 1992, the district court granted the FDIC's modified substitution motion. It ordered the substitution of the FDIC as successor in interest to First Security's "derivative claims" (i.e., the

claims for injuries suffered by First Security Bank), and directed Anthony to relinquish all files in his possession relating to those claims. Pet. App. A1-A2. The court permitted Anthony to remain in the case as counsel for the individual shareholders and directors with respect to whatever "nonderivative claims" they might have, without deciding at that juncture whether any such claims had been alleged in the complaint. *Id.* at A2.

Anthony challenged that order by filing numerous successive pleadings, including a notice of appearance of counsel, in which he stated that he represented the plaintiff-shareholders of First Security Bank in their "derivative claims." On September 10, 1993, the district court granted the FDIC's motion to strike Anthony's appearance as counsel for the individual shareholders and directors with respect to those claims. The court advised Anthony that, "if [he] wishe[d] to appear as counsel for any plaintiffs in the [action], he [would have to] file a motion to intervene, pursuant to F.R.C.P. 24, setting forth with specificity each and every nonderivative claim that he represent[ed]." Pet. App. A6-A7. On September 17, 1993, the court denied Anthony's motion to "Reconsider, Rehear, Vacate and/or Amend," and it ordered the clerk of court not to receive or file further pleadings from Anthony in this case unless those pleadings conformed to the September 10, 1993, order. Gov't C.A. Br. 9-10.

On January 3, 1994, Anthony filed a motion to intervene to assert both "derivative" and "nonderivative" claims purportedly on behalf of the individual shareholders and directors of First Security. On June 9, 1994, the district court rejected that motion, on the ground that it failed to comply with the court's

instruction that any such motion set forth with specificity any claim that could be considered independent and separate from those asserted directly by First Security. Pet. App. A8-A9.

On July 1, 1994, Anthony filed a second motion to intervene, this time seeking to assert claims in his personal capacity as a *pro se* litigant. Anthony claimed that he was entitled to a 30% share in the claims against the First Virginia defendants under the contingency fee arrangement he had made with First Security before its demise. The district court again denied intervention. It concluded that Anthony's *pro se* motion "r[o]se no higher" than the motion to intervene that he had filed on behalf of the individual shareholders and directors. Pet. App. A10-A11.

Anthony next filed a "Notice of Lien" and a "Motion to Impress Lien," in which he claimed to have an attorney's lien upon the case as security for his fees and services rendered. The district court struck the notice of lien and denied Anthony's motion to impress a lien. The court observed that, by virtue of 12 U.S.C. 1821(d)(13)(D), it had no subject matter jurisdiction to review in the first instance claims against the assets of a failed depository institution, and that Anthony's exclusive recourse was to pursue his claims according to the administrative procedures set forth in 12 U.S.C. 1821 (d)(3)-(10). Anthony had not followed those procedures, however, and the 90-day deadline for doing so (see 12 U.S.C. 1821(d)(3)(B)(i) and (d)(5)(C)(i)) had long since run. Gov't C.A. Br. 11-12.

3. On December 13, 1993, the district court granted the First Virginia defendants' motion to dismiss in part and denied it in part. In its order, the court observed that the complaint stated no claims on

behalf of First Security's shareholders and directors that were distinct from First Security's own claims. Gov't C.A. Br. 12-13.

After discovery, the FDIC and the First Virginia defendants agreed to settle the case. They submitted a draft joint order requesting the district court to dismiss the complaint with prejudice, which the court entered on July 10, 1995. Pet. App. 12a-13a.

4. Anthony and the shareholders and directors he represents (petitioners herein) filed three successive notices of appeal, raising 63 assignments of error. They appealed (i) the district court's June 9, 1994, order denying Anthony's motion to intervene on behalf of the shareholders and directors; (ii) the district court's August 15, 1994, order denying Anthony's motion to intervene as a pro se litigant to assert his personal claim for a 30% share in the claims that First Security could have asserted against the First Virginia defendants; and (iii) the district court's denial of Anthony's motion to impress a lien on the FDIC, and its July 10, 1995, order dismissing the case with prejudice. The court of appeals consolidated the appeals, and it summarily affirmed each of the challenged orders. Pet. App. A17-A25.

ARGUMENT

1. Petitioners contend (Pet. 12-15, 20-22) that the court of appeals erred in affirming the district court's order denying their initial motion to intervene to assert the shareholders' and directors' "nonderivative claims." They argue that the court's decision conflicts with *In re Sunrise Securities Litigation*, 916 F.2d 874, 889 (3d Cir. 1990), *FDIC* v. *Jenkins*, 888 F.2d 1537, 1546 (11th Cir. 1989), and *Howard* v. *Haddad*, 916 F.2d 167 (4th Cir. 1990), which upheld the right of

institution-related parties to assert their own individual, nonderivative claims against officers and directors of a failed depository institution. Petitioners' reliance on those cases is misplaced. The district court did not deny petitioners' motion to intervene out of a mistaken belief that individual shareholders and directors can never assert nonderivative claims against a receivership, but rather because petitioners failed to heed the district court's directive that they state with specificity any nonderivative claims that they wished to assert. Pet. App. A8. Petitioners' disagreement with the district court's conclusion respecting the sufficiency of their pleadings is fact-bound and does not warrant further review.

2. Petitioners argue (Pet. 16-22) that the district court should not have permitted the FDIC to be substituted as the proper party to assert the "derivative claims" in this case. That argument is without merit. As we have explained, notwithstanding the parties' and the district court's references to "derivative claims," that appellation was a misnomer. The claims in question, which related to injuries suffered directly by First Security, belonged in the first instance to First Security through its receiver, the FDIC. Such claims may be brought as derivative claims only following an unsuccessful demand on the receiver. See Fed. R. Civ. P. 23.1; see also *In re Sunrise Securities Litigation*, 916 F.2d at 879 & n.5. Petitioners had no occasion to make such a demand in this case because the FDIC prosecuted First Security's claims directly. Lacking standing to assert any derivative claims, petitioners made no pretense of doing so in their complaint.

3. To the extent petitioners argue (Pet. 18-19) that the FDIC should not have been substituted for First

Security with respect to First Security's claims because the FDIC had an "acknowledged" conflict of interest, that argument (which finds no support in the record) is foreclosed by the statute. As receiver, the FDIC succeeds to all of a depository institution's "rights, titles, powers, and privileges," including its choses in action. 12 U.S.C. 1821(d)(2)(A)(i). It is vested with the exclusive authority to operate the institution, to conduct the institution's business, and to collect the obligations owed the institution, all in accordance with the detailed provisions of the statute. 12 U.S.C. 1821(d)(2)(B), 1821(d)(2)(I). Although petitioners, as former shareholders, are residual claimants against the receivership, the FDIC as receiver possessed First Security's claims against the First Virginia defendants in the first instance, and, absent an unsuccessful demand, the FDIC was the sole party authorized to prosecute those claims. Permitting petitioners to sue directly for claims emanating from injury to the institution would, moreover, "circumvent the priority scheme by enabling [shareholders] to recover the institution's assets in advance of other general creditors and claimants with superior interests." *In re Sunrise Securities Litigation*, 916 F.2d at 889.

4. Finally, Anthony renews his contention that he is entitled to a 30% share in First Security's claims based upon the contingency arrangement he entered into with First Security before its demise, and that that purported interest gave him a property right in the underlying litigation. Pet. 20-22. That argument is without merit. Contrary to Anthony's view, he had no property interest in First Security's claims. After his discharge as counsel, Anthony was entitled solely to compensation in accordance with the princi-

ples of *quantum meruit*. See *Fary* v. *Aquino*, 241 S.E.2d 799, 800 (Va. 1978); *Heinzman* v. *Fine, Fine, Legum & Fine*, 234 S.E.2d 282, 286 (Va. 1977). His recourse, therefore, was to file an administrative claim for the reasonable value of the services that he rendered to First Security under the claims process established by 12 U.S.C. 1821(d)(3)-(10). Having failed to avail himself of the administrative claims process, Anthony was barred from seeking a remedy in federal district court. See 12 U.S.C. 1821(d)(13)(D); see, *e.g.*, *FDIC* v. *Shain, Schaffer & Rafanello*, 944 F.2d 129, 132-137 (3d Cir. 1991) (concluding that district court lacked jurisdiction over claims for attorneys' fees made outside the administrative procedure set forth in Section 1821); *RTC* v. *Elman*, 949 F.2d 624, 626-630 (2d Cir. 1991) (same).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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